

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

IN RE: EXECUTION OF PERSONAL :
 :
PROPERTY OF NORTH BRANCH : No. 04-00,180
 :
TRANSFER, INC. AND JOHN BOWER :

OPINION
Issued Pursuant to Pa. R.A.P. 1925(a)

John Bower has appealed this court's order denying his request to set aside the execution sale that took place on February 6, 2004. The burden of proving circumstances warranting the setting aside of an execution sale is upon the applicant, and the material allegations of the application are generally required to be established by clear evidence. Bornman v. Gordon, 527 A.2d 109, 111 (Pa. Super. 1987). The court found Mr. Bower did not meet this burden.

Mr. Bower first alleges he did not receive notice of sale as required by Pa.R.D.J. 412, which states that notice must be given to the defendant at his last known address. The court found credible the testimony of Constable William T. Welter, who stated he mailed notice to 100 Rose Street. Although the defendant also used another business address, the 100 Rose Street was valid, and was in fact listed in the telephone book under his business, North Branch Transfer. Moreover, Penny Bower testified that she regularly picked up mail at that address. Constable Welter also testified that he saw mail being delivered at the 100 Rose Street address on the date of the sale. Although Mr. Bower and Ms. Bower both testified they never received notice at that address, the court did not find their testimony to be credible.

Elaine Musser, the credit manager at Bastian's, testified that she telephoned North Branch Transfer's office one week before the sale and one day before the sale, to discuss the impending sale and try to work out financial arrangements to avoid the sale. She received no response to her messages. Michael Bastian II also testified that the company had been working with the Bowers for eighteen months, in an attempt to avoid the sale. Constable Welter testified that he had discussed the impending sale with Mr. Bower, and Mr. Bower twice requested that the sale be delayed to give him time to make the payments. These requests were honored, but Mr. Bower never followed through with satisfying his debt. The testimony of Mr. Bastian, Ms. Musser, and Constable Welter, all of whom the court found credible, supports this court's finding that Mr. Bower knew of the sale and was simply unresponsive. The court believes the petition to set aside the sale is simply another attempt to avoid paying his debt to Bastian's.

Next, Mr. Bower alleges there was improper and incomplete posting of handbills. While it is true Constable Welter posted notice on only one of the five vehicles at one site and only one of the three vehicles at another site, the court deems this posting sufficient. Rule 3129.2(b) states that the notice must be posted "upon the property." As the Superior Court stated in *Bornman*, supra at 113, the posting requirements are intended to

'create circumstances which will lead to an "open" sale, one which is well attended and designed to realize the highest sum possible.' 9 Goodrich-Amram 2d §3128(a)(1). They are not designed to give additional notice to the judgment debtor that the levy will culminate in a sheriff's sale. The burden of showing inadequate notice resulting in prejudice is upon the person who seeks to set aside the sale. Absent evidence that the sale price was inadequate, a court will be reluctant to find prejudice sufficient to require another sale.

As addressed below, the court does not find the sale price inadequate.

Mr. Bower next complains that no schedule of proposed distribution was filed. As this issue was never formally raised before the court, the court cannot address this issue. Nor do we believe this minor irregularity, even if it occurred, would constitute sufficient basis to set aside the sale.

Mr. Bower's final complaint is that inadequate consideration was received for the property. The court found that Mr. Bower had not provided competent evidence of the actual or estimated value of the property shown, and therefore the court will not set aside the sale on the basis of gross inadequacy. See Bornman v. Gordon, supra; J.B. Van Sciver Company v. Smith, 477 A.2d 550 (Pa. Super. 1984). Although John Bower testified regarding his opinion of the value of the items sold, the court did not find his testimony to be credible.

BY THE COURT,

Date: _____
Richard A. Gray, J.

cc: John Felix, Esq.
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William Welter, Constable, 829 Railway St., Williamsport, PA 17701
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